United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7259

ORIGINAL

To be argued by
JOSEPH M. WEITZMAN

In The

United States Court of Appeals

For The Second Circuit

FRANK LOWELL,

Plaintiff-Appellant,

vs.

TWIN DISC, INCORPORATED,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
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SECOND Circuit

Appeal from the Order of the Hon. Jacob Mishler Dated March 28, 1975

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7259

FRANK LOWELL,

Plaintiff-Appellant,

-against-

TWIN DISC, INC.,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF THE CASE

Plaintiff appeals from an order of the District Court, Eastern District of New York (Mishler, C.J.) denying his motion to amend the complaint and granting defendant's motion for summary judgment.

PROCEEDINGS AND JURISDICTION

This action was commenced in October 1972 in the Supreme Court of the State of New York, County of Suffolk.

It was removed to the United States District Court for the Eastern District of New York upon the petition of defendant filed November 21, 1972 pursuant to 28 U.S.C. §1441.

The complaint (55a)[1/] charged the defendant corporation Twin Disc, Inc. with breach of a written contract guaranteeing the terms of an employment agreement between plaintiff and a wholly-owned subsidiary of defendant, LEM Instrument Corporation ("LEM") and breach of an acquisition agreement, pursuant to which defendant acquired all of the shares of LEM from plaintiff and his associate.

In a separate case in Supreme Court, Suffolk County, plaintiff unsuccessfully sought to recover from LEM damages arising solely out of LEM's alleged breach of the employment contract. Thereafter, plaintiff sought to amend the complaint in the Federal action pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 15 and defendant moved for summary judgment pursuant to FRCP Rule 56.

In his Memorandum of Decision and Order dated March 28, 1975 (273a), Chief Judge Jacob Mishler denied plaintiff's

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1/ References to the Joint Appendix are cited as page numbers followed by the letter "a".

motion to amend the complaint and granted defendant's motion for summary judgment. A motion for reargument was denied (290a). Judgment was entered on April 1, 1975.

Plaintiff has appealed from the order of March 28, 1975 and the judgment entered thereon. Notice of appeal was filed on April 24, 1975 (291a). Jurisdiction of this Court is based on 28 U.S.C. §1291.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a genuine issue of material fact exists entitling plaintiff to a trial as to whether the employment agreement with LEM and the stock acquisition agreement with Twin Disc, Inc. were separate and distinct contracts and mutually exclusive of one another?

2. Whether the issues litigated in the Suffolk County Supreme Court action based exclusively on the employment agreement barred on principles of res judicata the assertion in the instant action of causes of action against the defendant based on a mutually exclusive stock acquisition agreement?

3. Whether the District Court erred in "presuming" that the terms of an independent stock acquisition agreement were "implicitly" conditioned upon plaintiff's status as an employee in the context of a motion for summary judgment

against the plaintiff?

4. Whether the District Court abused its discretion in not permitting plaintiff to amend his complaint where there was no showing made of prejudice to the rights of any party?

SUMMARY OF ARGUMENT

The issues tried, or which could have been tried, in the state court action become critical and highly significant to this appeal because, based on the judgment against plaintiff in Lowell v. LEM Instrument Corporation, the District Court granted summary judgment to Twin Disc on the ground of res judicata in the pending Eastern District action (277a).

The District Court erred in its assessment of what was decided in the state court action, as will be demonstrated by a comparison of Chief Judge Mishler's opinion with the transcript of the actual trial.

The District Court's threshhold finding, upon which the entire decision rests, is that something other than the employment agreement between LEM and plaintiff was at issue in the state court action (276a). This, it will be shown, is clearly not so. The remainder of the decision, which is

based upon that incorrect assessment, is fatally defective because of it.

The state court trial was strictly limited to the issue of the employment contract between LEM and plaintiff and its breach. The plaintiff and LEM were the only two parties to the contract and the only two parties to the lawsuit. Not only were the direct obligations of Twin Disc on the other agreements not at issue, they could not have been placed at issue in the state court action. Attorneys for LEM diligently labored to keep Twin Disc out of it. They were successful. Therefore, it was manifest error for the District Court to "infer" and "presume" that the rights of the parties to the stock acquisition agreement were in any way passed on or disposed of in the state court case.

In addition, plaintiff will argue that the District Court erred in exercising presumptions and inferences against the plaintiff on a motion for summary judgment (274a). Summary judgment is a devastating weapon which judicial convention holds in check by resolving all doubts and close questions against the movant. The Court is simply not permitted to embark upon flights of presumption in movant's favor in order

to justify a grant of summary judgment and obscure the existence of genuine triable issues as to material facts.

Finally, it is submitted that the District Court abused its discretion in denying plaintiff leave to serve and file an amended complaint, which leave should have been freely granted in the interests of justice. This is especially so where, as here, the rights of the parties are not prejudiced thereby and the litigation is not unduly delayed. Valuable rights of the plaintiff based on defendant's alleged breaches of the stock acquisition and guarantee agreements have been lost without a trial on the merits because amendment was not permitted.

POINT I

THE MATTERS AT ISSUE BETWEEN THE PARTIES TO THIS LITIGATION WERE NOT AND COULD NOT HAVE BEEN DECIDED IN THE STATE COURT ACTION

Clearly, plaintiff's point of departure on this appeal must parallel that of Judge Mishler's order of March 28, 1975 (273a) which is being reviewed herein. In its motion for summary judgment defendant urged the doctrine of res judicata as the basis for its entitlement to the relief sought. Judge Mishler had no difficulty holding that Twin Disc, the defendant in this action, could assert the defense of res judicata, even though it was a subsidiary of Twin Disc which successfully defended itself in the state court action. He then came to the heart of the matter which he stated thusly:

> "The issue remaining for determination is whether the prior judgment bars litigation of the claims and proposed claims asserted in this action. To resolve this issue it is necessary to determine what matters were decided by the earlier judgment." (276a)

The transcript of the proceedings in the state court action is extensive. However, as Judge Mishler realized, it is absolutely essential to the determination of the issue

before the District Court, and likewise, to this Court of Appeals. Copies thereof have been served and filed as exhibits pursuant to Federal Rules of Appellate Procedure, Rule 30(e). Judge Mishler had this transcript before him when he rendered his decision of March 28, 1975. He also had before him the pleadings from the state court action, as exhibits to defendant's moving papers (Complaint-79a; Amended Verified Answer - 82a).

Because we know that all of the state court materials were before Judge Mishler, his next statement is all the more inexplicable.

> "From the pleadings, the evidence and the judge's charge, it is apparent that the primary questions before the jury were whether the dissolution of Lem and the discharge of plaintiff were justified." (276a)

The plaintiff readily agrees that "the discharge of the plaintiff" was before the jury. The nature of the entire state court litigation was the alleged breach by LEM of an employment agreement. Judge Mishler noted by way of justification of the foregoing quoted statement:

> "In this regard defendant produced substantial evidence supporting its contention that Lem was dissolved because of its substantial losses and that plaintiff was discharged for cause." (276a)

And expanded thereon in footnote 2:

> "/2
>
> There was considerable testimony at trial that plaintiff fired Lem's most valuable employees, that he disregarded and mismanaged Lem's business and that he was abusive to his employees." (276a)

The error in the decision, which demolishes plaintiff's position, is the second observation of Judge Mishler that the justification for the "dissolution of Lem" was one of the "primary questions before the jury" in the state court action. This is simply not so. The significance of this holding becomes apparent when it is realized that plaintiff's action in the Eastern District of New York is based on defendant's alleged breach of a stock acquisition agreement. The issue of the dissolution of LEM is clearly applicable to plaintiff's federal claim; however that issue was never raised in the state court action. Once the erroneous assessment was made by the District Court, the ultimate decision followed therefrom.

The plaintiff has diligently combed the record of the state court action. Nowhere is there any mention of the dissolution of LEM as an issue in that litigation. The defendant is challenged to show a single reference to the "dissol-

The second cause of action is also based explicitly on the employment contract and its alleged breach by LEM:

> "7. That pursuant to the terms of said employment contract, it was provided that the annual salary to be paid to plaintiff during the term of the contract was $35,000.00, "with cost of living adjustments" such as were "accorded to employees" by Twin Disc Incorporated, a Wisconsin corporation; with a "beginning base salary of $26,120.00 per annum, plus the applicable cost of living adjustment."
>
> 8. On information and belief, that the aforesaid sum of $35,000.00 was computed on said base of $26,120.00 by adding thereto the cost of living adjustment based on the index of such cost of living furnished by the United States Bureau of Labor Statistics, taking the year 1950 as the base period.
>
> 9. On information and belief, that due to increases in the cost of living as reflected by said Labor Department index, showing that such cost had increased for the years subsequent to December 31, 1968, the salary that became due and owing to plaintiff under said employment contract for the period subsequent to December 31, 1968 approximated the sum of $25,000.00 over and above the salary actually paid to plaintiff at the said rate of $35,000.00 per annum.
>
> 10. That no part thereof has been paid." (80a)

Not one word about an illegal "dissolution" appears in the affirmative pleading.

Turning now to the responsive pleading, LEM's amended verified answer (82a) denies the allegations of the

complaint and asserts five defenses. It should be noted that all five defenses are directed solely to the employment contract and its alleged breach. They are as follows: (1) denies due performance by plaintiff; (2) alleges that plaintiff was discharged for cause; (3) alleges that plaintiff was discharged for failure to faithfully and diligently perform the duties of his employment; (4) the action is premature; and (5) plaintiff failed to mitigate damages.

Thus, an examination of the pleadings fails to give any indication as to how the District Court was able to conclude that the "dissolution of Lem" was at issue in the state court proceedings. On the contrary, it is quite apparent from the pleadings that the only issue was "the discharge of the plaintiff" and whether or not said discharge was justified.

B. The testimony

The transcript of testimony before the Suffolk County jury comprises more than 500 pages. A careful scrutiny of these pages indicates that only the issues of the employment agreement and the justification of plaintiff's discharge were tried by the parties and further, that all references to the

guarantee and stock acquisition agreements (upon which plaintiff's federal court action is based) were scrupulously limited.

For example, when the attorney who represented plaintiff at the trial read the guarantee agreement to the jury, defendant's attorney (Mr. Hughes) quickly rose to clarify and delimit the issues as follows (PA15):[2/]

> "MR. HUGHES: Your Honor, may I ask that Mr. Bobbe stipulate that the contract which he has referred to is not in suit in this action?
>
> MR. BOBBE: Which contract do you mean? The guarantee here?
>
> MR. HUGHES: Yes.
>
> MR. BOBBE: Yes.
>
> MR. HUGHES: That's not involved in this action at all.
>
> MR. BOBBE: We are not suing on that guarantee in this action, that's right."

At PA52, the Court indicated that it would not take testimony as to why the employment contract was for a term of seven years in the following words:

2/ References to Plaintiff's Appendix and Defendant's Appendix in the state court action are cited as "PA" and "DA" respectively, followed by the page number.

"THE COURT: What difference would it make? You are suing on a seven-year contract."

At PA220, the stock acquisition agreement was mentioned and Mr. Hughes objected. The Court queried:

"THE COURT: Is there a claim here for that? There is no claim here for that, is there?

After a discussion at the bench, the issue was dropped.

Finally, at PA387-8, Mr. Hughes raised an objection and the Court seized the opportunity to narrow the issues:

"THE COURT: I think we have gone pretty far afield. I have given you a great deal of latitude, both of you, in introducing other contracts, but there is a limit, and I think we ought to limit this to the issues of this case only. * * * "

C. The charge

If wide latitude was indeed given at the trial, the Court made up for it by the narrow strictures of its charge to the jury.

Judge Mishler found it "apparent" to him that the trial court's charge placed the dissolution of LEM at issue in the state court action (276a). That charge (PA522-562), while unsatisfactory to plaintiff's trial counsel in some

respects, left no doubt whatever in the jury's mind as to what was to be decided. Consider the explicitness of the following charge at PA531:

> "To be more specific now, the Plaintiff here, Mr. Frank Lowell, sued LEM Instrument Corporation, the Defendant, for breach of an employment contract dated July 3, 1968. He asserts in his papers, and he has attempted to prove to you in this case, that after the contract of employment was entered into, he did proceed to do what the contract calls for, assumed his duties, and he says that he discharged his duties faithfully and diligently and in the best interests of this corporation, and that he was discharged before the term of the contract came about."

and further at PA532:

> "The contract is here, and you have a right to look at it, and it provides for all the benefits which the Plaintiff was to receive under said contract. That's the Plaintiff's claim, that he was discharged without cause, and that he is entitled to recover what he would have recovered under this contract if he hadn't been unlawfully discharged."

Likewise, LEM's defenses were laid out to the jury at PA532-533:

> "There is no question here that the contract was entered into. Both sides agree to that. However, the Defendant asserts that this Plaintiff did not perform all of the terms and conditions on his part to be performed under the terms of the contract, that he didn't faithfully and diligently discharge the duties called for in the contract, and

> that he didn't use his best efforts on behalf of this corporation who employed him as manager and president of that corporation.
>
> The Defendant further asserts that because of the Plaintiff's failure to do what was called for him to do under that contract that the Plaintiff therefore breached the contract and that for that reason the Defendant discharged him, and that there was good cause for discharging him because he failed to perform all the duties under the contract that he should have performed."

To make certain that the jurors had only the employment contract issue before them, the trial court reiterated at PA539:

> "I say and repeat that you may consider all those things on the broad question of whether the Plaintiff faithfully and diligently performed his duties under the contract, and whether he used his best efforts on behalf of the corporation in the operation of said business in accordance with the provisions of the contract of employment contained in paragraph 1 thereof."

Clearly, there is no indication that the justification for the dissolution of LEM was before the state court jury. In fact, this entire concept that the dissolution of LEM was at issue in the state court was created in the mind of defendant's attorney and expounded for the first time on page 16 of defendant's moving affidavit (51a). The misstatement is then repeated over and over in defendant's

affidavits in support of the motion for summary judgment in the hope that constant repetition would make it plausible. See for example 52a, 206a, 215a, 251a and 258a.

Defendant realized that it would be entitled to summary judgment in the District Court action only if it could persuade Judge Mishler that the dissolution of LEM, a key element in the stock acquisition agreement, was actually decided against plaintiff in the state court action. Only then would the doctrine of res judicata be available to defendant.

Unfortunately for plaintiff, the tactic of constant repetition of an erroneous statement had its effect and the very phrase so often repeated in defendant's moving papers appeared in Judge Mishler's opinion (276a). The result was that the District Court used this single factual error as the touchstone for the remainder of its opinion. The decision and order of March 28, 1975 granting summary judgment against plaintiff must be reversed for that reason. Justice is not served by such tainted dispositions.

D. The burden of showing what was litigated and determined in the state court action is on the defendant.

Defendant has not overcome (or even assumed) the burden of proving conclusively on its motion for summary judgment exactly what was tried and determined in the prior litigation. It has relied on oft-repeated but unsupported pronouncements which grossly overstate its case. This will not surfice under New York law.

In Schwartz v. Public Administrator, 24 N.Y. 65, it was held:

> "New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." 24 N.Y. at 71 (Keating, J.)
>
> * * *
>
> "The burden of showing that the issue was identical and necessarily decided rests upon the moving party." 24 N.Y. at 73.

See also Townsley v. Niagara Life Insurance Co., 218 N.Y. 228, 233 wherein it is held that the movant must "clearly" show the identity of issue.

Defendant did not overcome this burden in the District

Court, and it cannot do so here. Plaintiff has demonstrated the contrary to be true.

E. The issues raised in the District Court action against Twin Disc could not have been tried in the state court action against LEM.

Plaintiff originally sued Twin Disc (the defendant herein) in the Supreme Court, Suffolk County. Defendant had the action removed to the Eastern District of New York pursuant to 28 U.S.C. §1441. The suit alleged breaches of a stock acquisition agreement and certain direct obligations of Twin Disc to plaintiff arising out of a separate guarantee agreement.

After removal of this action and during its pendency, plaintiff brought another action in Supreme Court, Suffolk County against LEM, a domestic corporation. This action was based on LEM's alleged breach of a third agreement, referred to as the employment agreement. LEM signed this agreement. Only LEM could be sued on it. Twin Disc was not a necessary party to the state court action within the meaning of FRCP Rule 19(a). If it was, it is certain that the non-joinder of a necessary party would have been set up as an additional

defense. This is especially so inasmuch as both LEM and Twin Disc were represented by the same lawfirm.

Nor did Twin Disc seek to intervene in the state court action pursuant to Civil Practice Law and Rules §1012 or §1013. Since Twin Disc did not care to be a party, was not required to be a party and in fact was not a party to the state court action, the issues in the instant litigation were not and could not have been raised in the Supreme Court. Had plaintiff attempted to claim against Twin Disc in the LEM litigation, plaintiff would have been met with the successful claim that a prior litigation was pending between the parties. Thus the Eastern District of New York is the only proper and available forum for this litigation. The conclusion of the District Court on the motion for summary judgment that:

> "It is evident that all claims now asserted by plaintiff in the present action could have been litigated in the state court proceeding. . ." (277a)

is clearly erroneous and should be reversed.

POINT II

NUMEROUS ISSUES OF MATERIAL FACT EXIST, ENTITLING PLAINTIFF TO A TRIAL ON THE MERITS

This action is replete with genuine unresolved factual issues, the most obvious of which is: Whether the employment agreement with LEM and the stock acquisition agreement with Twin Disc were separate and distinct contracts and mutually exclusive of one another?

Naturally defendant says that they are not and submits the affidavit of its president, sworn to November 13, 1974 to support its position (261a). Mr. Batten states at 262a:

> "3. In particular, I wish to emphasize that the Stock Acquisition Agreement, which is attached as Exhibit K to the Kheel Affidavit, and the Employment Contract, which is annexed as Exhibit L thereto, were executed as part of a single transaction. There would have been no employment contract in the absence of the acquisition of stock and there would have been no acquisition without the employment contract."

Just as naturally, plaintiff disagrees and submits his affidavit, sworn to December 11, 1974 to counter the defendant's position (263a). Mr. Lowell states at 263a:

> "2. While it is true that the employment agreement was executed at the same time as the stock acquisition agreement, they were not made or

> intended to be dependent on one another. If it had been the intention to make them such, there is no reason why it was not so stated.
>
> 3. The stock acquisition agreement was separately and independently negotiated with Twin Disc by me; and so far as I was concerned there could very well have been a stock acquisition agreement without any employment agreement."

Even in the face of these diametrically opposed affidavits, the District Court did not see this as an issue to be resolved at trial. Yet, the dispositive rule of law on this point should come from Judge Mishler's own opinion dated August 9, 1973 on a prior motion for summary judgment in this very case where he held that:

> "the difficult substantive question involved should be decided only after an opportunity to develop the facts fully at a trial and not by interpreting affidavits."

See also: Stevens v. Howard D. Johnson Co., 181 F2d 390 (4th Cir. 1950).

The Second Circuit Court of Appeals decision quoted by Judge Mishler is apposite here.

> "There are instances where summary judgment is too blunt a weapon to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case."

The question of whether we are dealing with a single or multiple transaction remains open and should be resolved by

competent testimony at a trial. Each side has its argument. Defendant notes that the agreements were signed the same day. Plaintiff points out that they were prepared by defendant's attorneys who specifically and undeniably created them as physically separate and distinct legal documents for legal and practical reasons.

Another open issue of fact relates to plaintiff's rights in the event that LEM is dissolved or its assets sold, as contained in paragraph 10 of the stock acquisition agreement (188a). The agreement provides that plaintiff will be given notice of any sale or dissolution of LEM and shall then have a six-month option to acquire from defendant all of LEM's outstanding shares at terms equivalent to the contemplated transfer. What in fact happened was that plaintiff was fired by defendant and given a take-it-or-leave-it offer (199a) to buy the assets only of LEM at a price fixed unilaterally by defendant. This issue was specifically pleaded in the third cause of action of the original complaint (58a) and is restated in the fifth cause of action of the proposed amended complaint (20a). Defendant claims that the fifth cause of action is subject to summary judgment because

Twin Disc's take-it-or-leave-it offer in the letter of October 9, 1972 (199a) satisfied defendant's obligations under the stock acquisition agreement. Since the offer, by its terms, applies only to LEM's assets whereas the contract requires the offer of LEM's stock and since defendant's offer had to be accepted immediately whereas the contract extended to plaintiff a six-month option period, it is clear that a genuine issue of fact exists in this case and that it is material. To make matters worse, the District Court made another serious error of fact in deciding against plaintiff on this issue:

> "On October 9, 1972, however, the board of directors of Lem voted to cease operations and to discharge Mr. Lowell for failure to perform his duties under the agreement. On this same date, pursuant to a clause in the acquisition agreement, Twin Disc sent a letter to Mr. Lowell offering to sell him the outstanding shares of Lem." (274a)

This Court is requested to merely compare the terms of the offer in the letter of October 9, 1972 (199a) with Judge Mishler's summary of its terms, in order to see the manifest factual error committed. This issue was not at all embraced by the jury verdict in the state court action and should be resolved at a trial on the merits.

Another issue requiring resolution is the validity of the claim contained in the third cause of action of the proposed amended complaint (19a). Plaintiff had a contractual right to stock bonuses in the event that LEM showed a profit. Defendant counters that LEM was so deep in debt to defendant that it could never show a profit during the term of the stock acquisition agreement (which still had three years to run when it was terminated by defendant). The issue arises as to what is meant by "profits", since the agreement specifically exempts product development costs as an item of diminution of profits. Plaintiff alleges that defendant prematurely terminated the business on the eve of profitability as contemplated in paragraph 1 of the contract. See, e.g., Inter-office communication dated February 26, 1971, Gibson to Batten at 241a, 243a.

A final illustration of an issue of fact which was not decided in the state court action and which cannot be resolved without a trial is the question: Whether the jury verdict against the plaintiff and in favor of LEM regarding the employment contract is res judicata as to plaintiff's

claim against Twin Disc in this action based on entirely separate agreements. The state court action did not deal with this key issue but the trial transcript does indicate that Twin Disc's representative continued to negotiate a settlement of the plaintiff's acquisition agreement rights even after plaintiff was terminated for cause. This indicates a clear corporate consciousness on the part of the defendant that it was still obligated to plaintiff under the acquisition agreement and certain items of the guarantee agreement, even though it was "off the hook" as to the employment contract obligations.

This issue and others were in no way touched upon in the state court action. The District Court was able to grant summary judgment only by engaging in presumption and inference wholly unsupported by the state court record.

> "The stock acquisition agreement was likewise implicitly conidtioned upon plaintiff's continued status as an employee in good standing. 1/" (274a)

Since when does a contract for the sale of a company implicitly mandate that the seller must remain an employee? Footnote 1 goes even further in making unwarranted inferences

against the plaintiff, especially on a motion for summary judgment by the opposing party.

> "/1 Although the agreement does not contain a clause conditioning payment upon plaintiff's continued employment consistent with the terms of the contract and Lem's continued existence, since both contracts were executed simultaneously and for the same purpose -- to finalize the sale of Lem -- such terms must be presumed." (274a)

The inference is even less appealing when it is recognized that the employment contract, by its very terms, was explicitly conditioned upon faithful and diligent employment of the plaintiff. The very absence of the same provision in the acquisition agreement, also drafted by defendant's lawyers, speaks eloquently against such an inference. And yet, on a motion for summary judgment, where a doubt is to be resolved against the movant and in favor of a trial on the merits, the District Court held against the plaintiff and grounded its holding upon a presumption. This, it is respectfully submitted, is clearly erroneous.

POINT III

THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WAS IMPROPER UNDER THE CIRCUMSTANCES AND SHOULD BE REVERSED

It is established in this circuit that the grant of summary judgment is improper where the evidence before the District Court reflects "the slightest doubt as to the facts." Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir., 1945)(L. Hand, J.) The "slightest doubt" rule of Doehler obtains in the Second Circuit. 6 Moore's Federal Practice ¶56.15 [1.-02]. Plaintiff submits that there is ample grounds for concluding that the facts presented by the parties raise considerable doubt, thereby requiring a trial.

This Court is competent to examine the pleadings and the transcript of the state court action de novo and, if convinced that the matter tried there differs from the issues in this case, reverse the grant of summary judgment. This was done in Peckham v. Ronrico Corp., 171 F.2d 653,658 (1st Cir., 1948) (Wyzanski, J.):

> "Our recital of the pleadings and judgment in that Florida case persuades us that that court was concerned with conveyances directly from Sol Meyer to Fred S. Meyer. No issue was raised in that case -as it is here- whether Sol Meyer contributed property

> or services to Gosch or Florida Cane Products Corporation in consideration of one or both of them issuing shares or giving other property to Ferd S. Meyer or other relatives and friends of Sol Meyer. Hence the cause of action now at bar is not the same as or based on the same transactions as the Florida cause of action.
>
> The judgment of the District Court is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant."

Similarly, plaintiff appeals to this Court to examine the state court record and compare it to the allegations of the proposed amended complaint. It will be found that, here as in Peckham, the causes of action at bar differ materially from the cause of action actually litigated. To grant summary judgment based on res judicata under such circumstances is reversible error.

In Ramsouer v. Midland Valley R. Co., 135 F.2d 101, 103 (8th Cir., 1943) the Court stated:

> "The record in this case is unusual in that it contains all the evidence introduced at the trial in the Oklahoma court. The question presented by [defendant's motion for summary judgment] is whether or not there is a genuine issue of fact. It does not contemplate that the court shall decide such issue of fact, but shall determine only whether one exists."

In the case at bar, Judge Mishler saw the issue of fact. It

was: Whether the stock acquisition agreement at issue was conditioned upon plaintiff's continued employment, as was the employment contract? It was at this point that the District Court decided the issue, with the help of an unsubstantiated presumption. (274a).

In Monks v. Hurley, 45 F.Supp.724, 727 (D. Mass., 1942), a prior decree was purported to be the basis for summary judgment. The Court held:

> "An examination of the findings and decree does not disclose that the original cause of action in those proceedings and the present ones are the same. * * * The party claiming the estoppel has the burden of proving what matters were put in issue beyond those which are apparent from the record in the other suit."

POINT IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

The District Court denied plaintiff's motion for leave to amend the complaint only because it had previously decided, erroneously it is submitted, that the claims sought to be asserted in the proposed amended complaint were already decided against the plaintiff in the state court action. If this Court reverses the grant of summary judgment, it is respectfully submitted that the denial of leave to amend should be reversed for the same reasons.

Additionally, leave to amend the complaint should have been granted in accordance with the provisions of FRCP Rule 15(a). Rule 15(a) is unique insofar as it contains as an integral part of its text, judicial direction as to the application of the rule. Rule 15(a) states:

> "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The Supreme Court of the United States has addressed itself to the spirit as well as the intent of Rule 15(a):

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this

mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶15.08, 15.10."

* * *

"Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Foman v. Davis, Executrix, 371 U.S. 178, 182 (1962)

There is no hard and fast rule by which to determine whether a court has abused its discretion. Obviously, the decisions of District Courts are entitled to substantial weight and should not be lightly disturbed. However, where the District Court does not give adequate recognition to the fundamental statutory policy controlling the case, or interprets the procedural Rules so narrowly that a party's substantive rights are adversely affected, the Court of Appeals must carefully weigh the practical effect of the lower court's decision against the statutory and procedural policies involved. The effect in the instant litigation is to throw the plaintiff out of federal court without affording him a chance to try his contract claims on the merits.

Absent some compelling reason, it is an abuse of discretion for the District Court to deny leave to amend under the liberal provisions of Rule 15(a). No such compelling reasons against amendment appear in this case.

CONCLUSION

The issues raised in the District Court action were demonstrably not raised, nor could they have been raised, in the prior state court litigation. If this Court does what the District Court said it did, i.e. examine the record of the state court proceeding to determine exactly what was litigated, the above fact will be borne out. On the basis of the serious factual errors leading to a determination of res judicata, the decision of the District Court granting summary judgment and denying leave to amend should be reversed and the action remanded for prosecution on the merits of the proposed amended complaint.

Dated: New York, New York
June 27, 1975

Respectfully submitted,

JOSEPH M. WEITZMAN,
Attorney for Plaintiff-
Appellant

COURT OF APPEALS
SECOND CIRCUIT

FRANK LOWELL,

Plaintiff-Appellant,

- against -

TWIN DISC INC.,

Defendant-Appelee.

Index No.

75-7259

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 31st *day of* July *1975 at* **One Chase Manhatten Plaza, N.Y., N.Y.**

deponent served the annexed Brief *upon*

Wilkie Farr & Gallagher

the **Attorneys** *in this action by delivering* 2 *true copy*es *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 31st
day of July *19* 75

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977